IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 6TH FEBRUARY 2006 / 17TH MAGHA, 1927

CRL.A.No. 1735 of 2006(C)

SC.213/2002 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA

APPELLANT: ACCUSED

MANTHAN, S/O. KANIYAN,
C.NO.3698, CENTRAL PRISON, KANNUR.

BY ADV. ADV.R.RENJITH(STATE BRIEF)

RESPONDENTS: COMPLAINANT

1. STATE OF KERALA, REP. BY
S.I. OF POLICE, THIRUNELLY POLICE STATION,
WAYANAD.

2. STATE OF KERALA, REP. BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.

BY PUBLIC PROSECUTOR SRI. S. DILEEP

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06/02/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

Crl.A.No. 1735 OF 2006-

Dated this the 6th day of February, 2007.

J U D G M E N T

The appellant, accused, in SC.No.213/2002 on the file of the Additional Sessions Judge (Adhoc)-II, Kalpetta, faced trial for an offence punishable under Section 55(a) of the Abkari Act. The allegation against the appellant was that he was found in possession of 17 packets of Karnataka made illicit arrack on 6.4.2001 near building No.T.P.-VII/105 at Kuniyil in Thrissilery amsom within the limits of Thirunelly Police Station and as the appellant was restrained by the local public, information was received by PW1, the Sub Inspector of Police, Thirunelly Police Station, came to the spot and arrested the appellant on preparing Ext.P1 arrest memo. On arresting the appellant, PW1- the Sub Inspector of Police prepared Ext.P2 seizure mahazar and seized MOs 1 to 3 from the possession of the appellant. To prove the above case against the appellant, prosecution examined Pws 1 to 6 and relied on Exts.P1 to P7. MOs 1 to 3 were also produced. On closing the prosecution evidence, the appellant was

questioned under Section 313 of the Code of Criminal Procedure. Denying the allegation of the prosecution, the appellant had stated that he is innocent and the articles seized from the appellant do not belong to him. However, relying on the prosecution evidence, the trial court found the appellant guilty under Section 55(a) of the Abkari Act and he was convicted thereunder and sentenced to undergo S.I for three years and also a fine of Rupees One Lakh with default sentence of fine, a further period of S.I for six months also ordered. The above conviction and sentence are assailed in the appeal.

2. Since the appeal is filed through the jail authorities and the appellant is not having his own counsel to argue the case, a member from the State brief panel has been appointed to argue the case for and on behalf of the appellant. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor. The counsel appearing for the appellant had taken two contentions before this Court attacking the judgment of the trial court. Firstly, the counsel submits that the trial court went wrong in believing the

prosecution witnesses to find the appellant guilty of the charge. Secondly, the counsel submits that in the light of the judgments reported in **Surendran v. Excise Inspector** (2004 (1) KLT 404) and **Sudhepan @ Aniyan v. State of Kerala** (2005 (2) KLD Crl. 631) the finding of the trial court that the appellant had committed the offence punishable under Section 55 (a) of the Abkari Act is not legally sustainable.

3. To prove the prosecution case against the appellant, the trial court relied on the evidence of PW1- the Sub Inspector of Police, who detected the crime and PW2- the Head Constable, who accompanied PW1 and also Pws 3 to 5, who are the independent witnesses, to prove the case against the appellant. PW1 had stated before the court that while he was in the police station, he had received information that the appellant was restrained by the public of the locality and the appellant is having in his possession MO1 bag which contained 17 bottles of Karnataka arrack each bottle is having 100 ml capacity without any license or permit under the provisions of the Abkari Act. According to this witness, he himself and other police officials reached at the spot where the appellant

was restrained by the public and on reaching at the spot, PW1 had prepared Ext.P1 arrest memo and the appellant was arrested at the spot. This witness has further stated that on preparing Ext.P2 seizure mahazar, he had seized Mos1 to 3 from the possession of the appellant and that after seizing the contraband article from the appellant, he had taken four bottles from the bag as samples sending for analysis. This witness has further stated that on taking the sample, the same was sealed and labeled in the presence of the appellant as well as the independent witnesses and thereafter the appellant was produced before the court and the samples were also produced before the court. This witness has further stated that on analysing the sample, he had received Ext.P7 chemical report which would reveal that the sample contained alcohol and identified as Karnataka made alcohol. The above evidence of PW1 is supported by the evidence of PW2. PW2 is the Head Constable, who accompanied PW1 at the time of detection of the crime. This witness has also stated before the court that the appellant was arrested at the spot and PW3 had seized contraband article from the possession of the appellant. The evidence of these officials has been

corroborated by the evidence of PWs 3,4 and 5, who are the independent witnesses to the occurrence. Pws 2 and 3 are the local persons, who restrained the appellant with the contraband article and they had given evidence before the court that the appellant was arrested at the spot by PW1 and seized contraband article from the possession of the appellant. Further these witnesses have stated that they watched the action taken by PW1 and they have put their signatures in Ext.P2 seizure mahazar. Relying on the above evidence, the trial court found, the prosecution had succeeded in proving, that the appellant was arrested from the spot as alleged by the prosecution and the contraband articles were seized from the possession of the appellant. On an over all appreciation of the evidence of these witnesses, this Court is of the view that the finding entered by the trial court is on the evidence adduced by the prosecution and it requires no interference by this Court.

4. The question to be analysed in the light of the contentions raised by the counsel for the appellant is that whether the evidence adduced by the prosecution is sufficient

to prove that the appellant was found in possession of the contraband article as the court had already found that there is no infirmity with the evidence of Pws 1 to 5, who had given evidence in support of the prosecution case. Hence, the first contention of the learned counsel is not tenable. Secondly, the contention of the learned counsel is that the prosecution had no case that the appellant was found in possession of contraband article in connection with exporting, transporting or transiting the contraband article as held in the judgments reported in **Surenderan v. Excise Inspector** (2004 (1) KLT 404) and **Sudhepan @ Aniyan v. State of Kerala** (2005 (2) KLD Crl.631). In this context, it has to be seen that, the prosecution case itself is that, the appellant was restrained by the local public on the day of the incident and the appellant was found in possession of MO1 bag and MO2 bottle of Karnataka made arrack. There was no case for the prosecution that he was transporting the above said contraband article from anywhere or he is in possession of the contraband article in connection with any of the actions, i.e., transporting, exporting or importing the same.

5. In the above circumstances, on the principles laid down by this Court in S**urendran's case** (cited supra) the finding of the trial court that the appellant is found guilty under Section 55(a) is not legally tenable. Further as per the principles laid down in **Sudhepan's case** (cited supra), it is the duty of the prosecution to allege or plea and to establish that the possession is in connection with transporting, exporting or importing the contraband article. In the case in hand the prosecution has no allegation that the appellant was found in possession of the contraband article in connection with transporting the same. If so, mere possession (possession in simpliciter) does not amount to an offence punishable under Section 55(a) of the Abkari Act. However, this Court has already found that the prosecution had succeeded in proving that the appellant was found in possession of the above article without any permit or license issued under the provisions of the Abkari Act. If so, the offence committed by the appellant can only be under Section 58 of the Abkari Act. From the above finding, the conviction and sentence awarded against the appellant under Section 55(a) of the Abkari Act are hereby set aside. Instead, the

appellant is found guilty under Section 58 of the Abkari Act and he was convicted thereunder and sentenced to undergo S.I for one year and a fine of Rupees One lakh with default fine, to undergo S.I for further six months.

With the above modification in the conviction and sentence, in all other respects, the appeal shall stand allowed partly.

K.THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.1735 OF 2006

JUDGMENT

6th February, 2007.